

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ALLAN GORDON,)
Plaintiff,) 3:07-CV-00085-LRH-RAM
v.)
RONALD DALRYMPLE, an individual,) ORDER
Defendant.)

Before the court is Defendant Dr. Ronald Dalrymple’s (“Dalrymple”) motion for summary judgment (#13¹). Plaintiff Dr. Allan Gordon (“Gordon”) has responded (#14), and Dalrymple has replied (#15).

I. Factual and Procedural History

Dalrymple and Gordon worked together at the Laughlin Mental Health Clinic, a clinic within the State of Nevada’s agency of Rural Clinics. (Mot. for Summ. J. (#13) at 2.) Gordon was hired in October 2006 to direct the Laughlin clinic, and about two weeks later Dalrymple was hired as a staff psychologist under Gordon. (*Id.*) Prior to working at the Laughlin clinic, Gordon and Dalrymple had held the same position at a facility in Florida, though some years apart. (Dalrymple Dep. (#13), Attach. 2 at 10:11-15.) The two first met on October 16, 2006, the day Dalrymple was

¹Refers to court’s docket number

1 hired. (*Id.* at 10:16-18.)

2 Beginning that day, Dalrymple began to keep track of his interactions with Gordon.
 3 (Dalrymple Letter (#14), Ex. 1 at 1.) On November 20, 3006, Dalrymple spoke on the phone to
 4 SueAnn Bawden, Deputy Director of Rural Clinics, about Gordon's "disparaging remarks about
 5 Christians." (Bawden Dep. (#13), Attach. 2 at 5.) Bawden informed Dalrymple such remarks
 6 "ha[ve] to be reported" because they can constitute a hostile work environment. (*Id.*) Since
 7 Bawden was on vacation at the time, she gave Dalrymple the private fax number of Ray Kendall,
 8 the Director of Rural Clinics. (*Id.* at 6:1-5.) Dalrymple submitted his letter of complaint ("letter")
 9 almost immediately after he spoke to Bawden (*Id.* at 6-7).

10 Dalrymple's letter begins with a dated catalogue of incidents Dalrymple found offensive.
 11 For example, Dalrymple writes that on October 24, 2006, "Gordon insulted me in front of the
 12 entire staff." (Dalrymple Letter (#14), Ex. 1 at 1.) Dalrymple also records Gordon as "slandering"
 13 Christians. (*Id.*) Following this catalogue, Dalrymple writes that Gordon displays narcissistic
 14 personality disorder, "sociopathic traits," and "passive-aggressive traits." (*Id.*) Dalrymple also
 15 writes that "Gordon is a spoiled rich kid from NYC, raised by an arms-dealing father who profitted
 16 [sic] from the deaths of millions in World War II." (*Id.*)

17 Dalrymple's letter initiated an investigation during which Gordon was temporarily
 18 reassigned. (*Id.* at 7:1-6.) The investigation found Dalrymple's claims could not be substantiated.
 19 (Dep't of Personnel Memo. (#13), Attach. 3 at 2-5.) Throughout the investigation, the only people
 20 who saw Dalrymple's letter were Kendall, Casey Gillham, Personnel Officer for Rural Clinics,
 21 Debbie Hosselkuss, Deputy Administrator of the Division of Mental Health and Developmental
 22 Services, and an investigator for the Department of Personnel. (Kendall Dep. (#13), Attach. 3 at 5,
 23 14-15, 25; Hosselkuss Dep. (#13), Attach. 4 at 4.) The letter was not included in Gordon's
 24 personnel file. (Kendall Dep. (#13), Attach. 3 at 26:11-14.)

25 Following the investigation, Gordon returned from his temporary reassignment. However,
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1 four women (two from Laughlin, two from Gordon's temporary location) filed sexual harassment
2 complaints against Gordon in December 2006. (*Id.* at 7:10-11.) These complaints led Kendall to
3 terminate Gordon, a probationary employee owing to his recent hire, on January 16, 2007.
4 (Bawden Dep. (#13), Attach. 2 at 12-16.) Dalrymple left the Laughlin Clinic on January 26, 2007,
5 moving to Florida for personal reasons. (Dalrymple Dep. (#13), Attach. 2 at 3:22-25.)

6 Gordon filed this action on February 20, 2007, alleging defamation and First Amendment
7 retaliation under 42 U.S.C. § 1983.

8 **II. Legal Standard**

9 Summary judgment is appropriate only when "the pleadings, depositions, answers to
10 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
11 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
12 law." Fed. R. Civ. P. 56C. In assessing a motion for summary judgment, the evidence, together
13 with all inferences that can reasonably be drawn therefrom, must be read in the light most
14 favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
15 475 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cnty. Hosp.*, 236 F.3d 1148, 1154 (9th
16 Cir. 2001).

17 The moving party bears the burden of informing the court of the basis for its motion, along
18 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
19 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
20 must make a showing that is "sufficient for the court to hold that no reasonable trier of fact could
21 find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.
22 1986). See also *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1141 (C.D. Cal. 2001). For
23 those issues where the moving party will not have the burden of proof at trial, the movant must
24 point out to the court "that there is an absence of evidence to support the nonmoving party's case."
25 *Catrett*, 477 U.S. at 325.

1 In order to successfully rebut a motion for summary judgment, the non-moving party must
2 point to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*
3 *Jefferson School Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that
4 might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*,
5 477 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue,
6 summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A
7 dispute regarding a material fact is considered genuine “if the evidence is such that a reasonable
8 jury could return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere
9 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient to
10 establish a genuine dispute; there must be evidence on which the jury could reasonably find for the
11 plaintiff. *See id.* at 252.

12 **III. Discussion**

13 **A. Procedural Issues**

14 The court addresses issues of subject matter jurisdiction *sua sponte*. *Fleck & Assoc., Inc. v.*
15 *City of Phoenix*, 471 F.3d 1100, 1107 n.4 (9th Cir. 2006). “Absent unusual circumstances, a party
16 seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship
17 of the relevant parties.” *Kanter v. Warner-Lambert Co.*, 265 F. 3d 853, 858 (9th Cir. 2001). Here,
18 though Gordon invokes diversity jurisdiction, Gordon’s complaint fails to affirmatively allege the
19 citizenship of each party to the action. (Compl. at ¶ 1). Therefore, there is no subject matter
20 jurisdiction based on diversity.

21 However, “any non-frivolous assertion of a federal claim suffices to establish federal
22 question jurisdiction . . .” *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 955 (9th Cir.
23 2004). Gordon states a nonfrivolous federal claim (Compl. at ¶ 16); therefore, the court retains
24 federal question jurisdiction under 28 U.S.C. § 1331.

1 **B. Defamation**

2 Under Nevada law, in order to establish a prima facie case of defamation, a plaintiff must
3 prove “(1) a false and defamatory statement by defendant concerning the plaintiff; (2) an
4 unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual
5 or presumed damages.” *Chowdhry v. NLVH*, 851 P.2d 459, 462 (Nev. 1993). A defamatory
6 statement lowers the defamed person in the estimation of the community, excites derogatory
7 opinions about the person, or holds the person up to contempt. *Lubin v. Kunin*, 7 P.3d 422, 425
8 (Nev. 2001) (*quoting K-Mart Corp. v. Washington*, 866 P.2d 274, 281-82 (Nev. 1993)).

9 Dalrymple argues he is entitled to summary judgment on Gordon’s defamation claim for three
10 reasons, two of which are affirmative defenses and one of which goes to the prima facie case. The
11 affirmative defenses are the common interest privilege and the intracorporate communications
12 privilege. With regard to the prima facie case, Dalrymple argues his statements asserted opinions,
13 not facts, and are thus not defamatory.

14 **1. Prima Facie Case**

15 “There can be no liability for defamation without proof of falsity,” and the plaintiff bears
16 the burden of proof regarding the statement’s falsity. *Nevada Ind. Broad. Corp. v. Allen*, 664 P.2d
17 337, 412 (Nev. 1983). Here, Gordon denies he made anti-Christian remarks and denies his father
18 profited from deaths in World War II. (Gordon Dep. (#14) at 1:19-28.) In addition, Gordon claims
19 he treated Dalrymple with “respect and professionalism” at all times. (*Id.*) These averments are
20 sufficient to establish falsity for the purposes of a prima facie case.

21 Gordon must also show actual or presumed damages. It is unclear whether Nevada law
22 requires special damages in stating a claim of libel. While one early case notes the necessity of
23 establishing special damages unless the claim is libelous per se, *Talbot v. Mack*, 169 P. 25, 34
24 (Nev. 1917), the Restatement, which Nevada follows for defamation, does not require special
25 damages in the case of libel, Restatement (Second) of Torts § 568 cmt. b (1971). However, since
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1 the defamatory statements “imput[e] [Gordon’s] lack of fitness for trade, business, or profession,”
 2 the statements constitute libel per se. *K-Mart Corp.*, 866 P.2d at 282 (discussing slander per se).
 3 For instance, Dalrymple alleges Gordon violated “professional relationships under [American
 4 Psychological Association] code” and Gordon, a psychologist working in a mental health clinic,
 5 was “sociopathic.” (Dalrymple Letter (#14), Ex. 1 at 2.) Since these statements clearly impute a
 6 lack of fitness for Gordon’s position as director of the Laughlin clinic, special damages are
 7 presumed, *K-Mart Corp.*, 866 P.2d at 282, and the court need not determine Nevada’s stance on
 8 the issue.

9 **i. Opinion vs. Fact**

10 Whether a statement is defamatory is generally a question of law. *Lubin*, 17 P.3d at 422.
 11 However, a statement may only be defamatory if it “contains a factual assertion.” *Flowers v.*
 12 *Carville*, 112 F. Supp. 2d 1202, 1210 (D. Nev. 2000) *rev’d in part on other grounds by Flowers v.*
 13 *Carville*, 310 F.3d 1118 (9th Cir. 2002). Statements of opinion cannot be defamatory because
 14 “there is no such thing as a false idea.” *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 87 (Nev.
 15 2003) (internal quotation marks omitted). In Nevada, in order to determine if a statement is one of
 16 fact or opinion, “the court must ask whether a reasonable person would be likely to understand the
 17 remark as an expression of the source’s opinion or as a statement of existing fact.” *Id.* at 88
 18 (internal quotation marks omitted). In addition, in determining if a statement is one of fact or
 19 opinion, three factors are relevant: “(1) whether the general tenor of the entire work negates the
 20 impression that defendant was asserting an objective fact; (2) whether the defendant used figurative
 21 or hyperbolic language that negates that impression; and (3) whether the statement in question is
 22 susceptible of being proved true or false.” *Flowers*, 112 F. Supp. 2d at 1211. Nevada law
 23 considers the statement in context, including medium and audience. *Riggs v. Clark County Sch.*
 24 *Dist.*, 19 F. Supp. 2d 1177, 1181 (D. Nev. 1998).

25 The “reasonable person” test and the three-factor test for whether a statement contains
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1 factual assertions may be simplified by a test based on presuppositions.² A *presupposition* is a
 2 proposition whose truth must be assumed for a statement to be appropriate in context. *See*
 3 *generally* David Beaver, *Presupposition*, in *The Handbook of Logic and Language*, 939 (J. van
 4 Bentham & A. ter Meulen eds., Elsevier 1997). For instance, in order for the statement *John*
 5 *stopped smoking* to make sense, the interpreter must presuppose the fact that John smoked at some
 6 previous time. The advantage of the presupposition test is its precision and simplicity: any
 7 statement which presupposes defamatory facts unknown to the interpreter is defamatory.

8 In addition, a test based on whether a statement is “susceptible of being proved true or
 9 false” fails to catch clearly defamatory remarks. For instance, the statement *John may or may not*
 10 *regret killing his wife* is not susceptible to proof of truth—it is a tautology—but the statement
 11 presupposes that John killed his wife. Therefore, the statement is defamatory as one containing
 12 factual assertions even though it fails the “proof” test and similar tests based on “objective” or
 13 “empirical” verification. *See, e.g., Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App.
 14 1995).

15 Dalrymple’s letter is rife with factual assertions. First, Dalrymple, a psychologist,
 16 diagnoses Gordon with narcissistic personality disorder, “sociopathic traits,” and “passive-
 17 aggressive traits.” (Dalrymple Letter (#14), Ex. 1 at 1.) Later, during the course of the
 18 investigation, Dalrymple claims to stick by his diagnoses despite never formally examining
 19 Gordon. (Kendall Memo. (#13), Attach. 3A.) Dalrymple’s position as a psychologist gives his
 20 statements more weight, raising them from opinion to fact, especially since they imply a formal
 21 evaluation of Gordon and thus access to facts unknown by the letter’s audience. *See Riggs*, 19 F.
 22 Supp. 2d at 1182. Second, Dalrymple states that Gordon was “raised by an arms-dealing father
 23 who profited from the deaths of millions in World War II,” that Gordon slandered Christians, and

25 ²This type of test is in line with the Restatement, which divides opinions into “pure” and “mixed.”
 26 Restatement (Second) of Torts § 566 cmt. b 1971. Pure opinion creates no liability, but mixed opinion can
 create liability depending on the implied, undisclosed factual assertions. *Id.*

1 that Gordon said Dalrymple “didn’t know anything.” (Dalrymple Letter (#14), Ex. 1 at 1-3.)
2 These statements clearly denote past events, not opinions. Third, statements such as “[Gordon]
3 never apologized for his insulting, obnoxious behavior” presuppose Gordon’s insulting behavior, a
4 factual proposition.

5 Further, the letter’s medium and audience suggest that the letter would be interpreted as
6 asserting factual propositions. The medium, a complaint through Nevada’s Department of
7 Personnel, entails an investigation and report. An investigation implies verification of factual
8 matters. Dalrymple’s contention he was simply “rant[ing]” against Gordon is belied by his implied
9 request for Department of Personnel action: “He is in violation of state policy by creating an
10 abusive and hostile work environment. I need to consult with your human resources personnel
11 about my rights and welfare in this situation.” (Dalrymple Letter (#14), Ex. 1 at 3.) Additionally,
12 the letter’s audience, personnel in Rural Clinics, is likely to give psychological evaluations
13 significant deference since these personnel work in the field of mental health. Therefore,
14 Dalrymple’s audience likely interpreted his statements as factual assertions instead of opinion.
15 Though the tenor of the letter is angry, and though the letter does display instances of hyperbole
16 (for instance, Dalrymple calls Gordon a “duplicitous primate,” a “monster,” a “sick bastard”), the
17 letter’s factual assertions dominate the letter’s content.

18 **2. Common-Interest Privilege**

19 The common-interest privilege does apply to Dalrymple’s letter, but factual issues
20 surrounding Dalrymple’s actual malice prevent summary judgment. “A qualified or conditional
21 privilege exists where a defamatory statement is made in good faith on any subject matter in which
22 the person communicating has an interest, or in reference to which he has a right of duty, if it is
23 made to a person with a corresponding right or duty.” *Circus Circus v. Witherspoon*, 657 P.2d
24 101, 105 (Nev. 1983). Since qualified privileges are affirmative defenses, the defendant bears the
25 burden of pleading and proving the privilege applies. *Pope v. Motel 6*, 114 P.3d 277, 284 (Nev.
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1 2005). A conditional privilege is a question of law, and after a defendant establishes such a
 2 privilege, the plaintiff may show that the defendant abused the privilege by acting with actual
 3 malice. *Circus Circus*, 657 P.2d at 105. “Actual malice is a stringent standard that is proven by
 4 demonstrating that a statement is published with knowledge that it was false or with reckless
 5 disregard for its veracity.” *Pegasus*, 57 P.3d at 92. Evidence of negligence, motive, and intent
 6 may cumulatively establish recklessness. *Allen*, 664 P.2d at 344.

7 In this case, Dalrymple had a duty to report incidents that might constitute a hostile work
 8 environment, and Bawden told Dalrymple that anti-Christian remarks would constitute a hostile
 9 work environment. (Bawden Dep. (#13), Attach. 2 at 5:18-25.) In addition, the letter’s recipients
 10 had a duty to investigate and prohibit harassment and discrimination in the workplace. (See
 11 Governor’s Policy Against Sexual Harassment & Discrim. (#13), Attach. 5 at ¶¶ 3, 6.³) Therefore,
 12 the privilege provisionally applies.

13 However, a triable issue remains as to whether Dalrymple abused the common-interest
 14 privilege by acting with actual malice. Since Gordon may establish actual malice through
 15 recklessness—and recklessness may be established through negligence, motive, and intent, *Allen*,
 16 664 P.2d at 344—a reasonable jury could infer that Dalrymple’s diagnoses (to take one example)
 17 were reckless. Therefore, summary judgment based on the common-interest privilege is not
 18 appropriate.

19 **3. Intracorporate privilege**

20 The intracorporate privilege is also a qualified privilege. *Simpson v. Mars Inc.*, 929 P.2d
 21 966, 968 (Nev. 1997). An intracorporate communication is only privileged if the communication
 22 occurs in the regular course of the corporation’s business. *Id.* Here, Dalrymple has shown his
 23 letter was sent in the regular course of the Laughlin clinic’s business because the letter went

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 25 ³While Dalrymple alleges religious discrimination, not sexual discrimination, his complaint went
 26 through procedures pursuant to the state’s policy on sexual harassment and discrimination.

1 through the proper channels for filing a complaint against a superior. Gordon has not contested the
2 application of the intracorporate privilege. Thus, the privilege provisionally applies. However,
3 since the intracorporate privilege, like the other qualified privileges, may be overcome by evidence
4 of actual malice, a triable issue still exists on Gordon's defamation claim.

5 **C. First Amendment Retaliation Pursuant to 42 U.S.C. § 1983**

6 Gordon alleges a First Amendment retaliation claim in violation of his free exercise of
7 religion. When a government employee alleges that he has been punished in retaliation for
8 exercising his First Amendment rights, the employee must prove "(1) that the conduct at issue is
9 constitutionally protected, and (2) that it was a substantial or motivating factor in the punishment.
10 Even if the employee discharges that burden, (3) the government can escape liability by showing
11 that it would have taken the same action even in the absence of the protected conduct."

12 *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 510 (9th Cir. 2004).

13 Here, even assuming Gordon's religious remarks constituted protected conduct within the
14 ambit of the Free Exercise clause, the remarks were not a cause of Gordon's termination. The
15 undisputed evidence demonstrates Gordon's termination resulted from the four sexual harassment
16 complaints lodged against him. (Bawden Dep. (#13), Attach. 2 at 12-16.) In addition, the
17 investigation following Dalrymple's letter uncovered no evidence that Gordon discriminated
18 against Christians. (Dep't of Personnel Memo. (#13), Attach. 3 at 2-5.) Therefore, partial
19 summary judgment on Gordon's First Amendment retaliation claim is appropriate.

20 **IV. Conclusion**

21 Dalrymple's letter contained defamatory statements. Though the letter facially falls under
22 the common-interest and intracorporate qualified privileges, an issue of fact remains as to
23 Dalrymple's actual malice. Therefore, summary judgment on the defamation claim is
24 inappropriate. However, Gordon's First Amendment retaliation claim fails to establish a prima
25 facie case, and partial summary judgment is thus warranted.

1 IT IS THEREFORE ORDERED that Dalrymple's Motion for Summary Judgment (#13) is
2 GRANTED in part and DENIED in part.

3 IT IS SO ORDERED.

4 DATED this 8th day of July 2008.



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7 LARRY R. HICKS
8 UNITED STATES DISTRICT JUDGE
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